UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CHRISTOPHER McGOWAN, appellant, v. DEPARTMENT OF THE AIR FORCE, agency.	DOCKET NUMBER DA07528510022 DATE: JUL 17 1985

Before

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

OPINION AND ORDER

The appellant was removed from his position of Commissary Store Worker with the agency's Barksdale Air Force Base for eating and pocketing 4 ounces of yogurt-covered walnuts valued at approximately $.54 and upon consideration of his past disciplinary record.[1/] The appellant petitioned the Board's Dallas Regional Office for appeal of the agency's action.

In an initial decision dated January 14, 1985, the presiding official sustained the agency's action, finding (1) that the agency established its charge by preponderant evidence, (2) that the appellant failed to establish that the action was the result of reprisal for a protected disclosure and (3) that the penalty of removal was within the limits of reasonableness.

[1/] Appellant's past disciplinary record consisted of an official reprimand and a 3-day suspension, both for tardiness and unauthorized absence.

The appellant has now petitioned the Board for review of the initial decision[2/] and the National Federation of Federal Employees (union) has filed a "Petition For Review Or, In The Alternative, [a] Motion To Intervene." Because we find the agency's selection of the penalty of removal exceeds the limits of reasonableness, see Douglas v. Veterans Administration, 5 MSPB 313 (1981), and because the presiding official failed to rule on a motion to intervene filed by the union, we hereby GRANT the appellant's petition for review under 5 U.S.C. § 7701(e)(1).

Appellant alleges, inter alia, that the presiding official made several procedural errors at the hearing below but has made no showing that the alleged errors have adversely affected his substantive rights. See Karapinka v. Department of Energy, 6 MSPB 114 (1981). Further, appellant contends, without specifying, that there were several errors in the hearing transcript and now requests that these errors be corrected. The Board's regulations provide for corrections to a hearing transcript by submission of a motion within ten days of receipt of the transcript. See 5 C.F.R. § 1201.53(b). Appellant did not file such a motion.

2/ Although the agency contends that appellant's petition for review was untimely, we find that the petition was timely filed. The Board has held that an unpostmarked petition for review received by the Board will be presumed, absent other evidence, to have been mailed five days prior to the date of receipt. Dickinson v. Department of Energy, 3 MSPB 335 (1980). In the present case, the deadline for filing the petition for review was February 18, 1985. Although the postmark on the envelope accompanying appellant's petition for review is unreadable, the petition was received by the Board on February 22, 1985. Thus, we find that the petition for review was timely filed.

SELECTION OF PENALTY

In Douglas v. Veterans Administration, 5 MSPB 313 (1981), the Board held that it will not disturb an agency's selection of a penalty unless the penalty exceeds the bounds of reasonableness. Absent a showing that an agency's choice of penalty for employee misconduct is an abuse of discretion, the agency-selected penalty will not be disturbed. See Dewitt v. Department of the Navy, 747 F.2d 1442 (Fed. Cir. 1984). In determining whether the agency's penalty amounts to an abuse of discretion the Board is required to evaluate the "unique circumstances" of each case. Miguel v. Department of the Army, 727 F.2d 1081, 1083 (Fed. Cir. 1984).

We have evaluated the unique circumstances in the case before us and conclude that the penalty of removal amounts to an abuse of the agency's discretion. The record reflects that in determining the penalty, the agency considered such factors as appellant's notice and understanding of the seriousness of the charge, that this was an instance of repeated misconduct for which appellant was previously counseled, that appellant has a past disciplinary record involving charges of tardiness and unauthorized absence, and that appellant was employed in a position of trust in handling commissary merchandise. However, we find that the agency did not give proper consideration to other factors favoring mitigation to a lesser penalty. See Dewitt, supra. These unique factors, we find, outweigh the factors considered by the agency in assessing the penalty of removal.

First, while the charge of unauthorized consumption and possession of commissary merchandise is a serious offense, the de minimis value of the merchandise

(54 cents) was not given proper consideration in light of the other circumstances noted below. Miguel, supra, at 1084. Second, appellant's past disciplinary record developed in the few months preceding his removal. Prior to that period he had an unblemished record in his almost eight years of service with the agency. Third, because appellant's recent disciplinary record involved charges unrelated to the charge presently before the Board, and because only a reprimand and three-day suspension had been imposed, we find on these facts that more severe discipline, short of removal, is called for. Finally, the evidence of record indicates that appellant is learning disabled and had difficulty understanding the nature and implications of the agency's rule prohibiting the unauthorized consumption and possession of commissary merchandise.3/

We find, under these circumstances, that the penalty of removal is disproportionate to the offense charged. Thus, on the basis of these considerations, the Board concludes

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3/ In two letters to the agency after issuance of the Notice of Proposed Removal, appellant's father explained that appellant is mentally retarded and is functionally illiterate. He noted that although appellant graduated from high school in a special education program and his subsequent employment was facilitated by a vocational rehabilitation program, it remains difficult for appellant to express his thoughts and opinions. See Appeal File, Tab 1. The agency acknowledged an awareness that appellant had difficulty in expressing his thoughts and opinions. See Agency File, Tab 18. Moreover, when the agency implemented a stricter policy on disciplining employees for unauthorized consumption and possession of commissary merchandise, it took special measures to explain this policy to appellant because of an apparent belief that appellant may not have fully appreciated the ramifications attendant to a violation of this rule. See Hearing Transcript at 16-17.

that the agency's selection of the penalty of removal was an abuse of discretion and that a 30-day suspension is the maximum reasonable penalty for the sustained misconduct. See Miguel, supra; Stancil v. Department of the Air Force, MSPB Docket No. AT07528310859 (June 5, 1984).

MOTION TO INTERVENE

Although the union is not appellant's designated representative before the Board, it claims a right to intervene in this proceeding to protect its representational interests with respect to the calling of a witness, Paula Godfrey, who testified at the hearing in this case and who also serves as a union Vice-President. The union contends that the calling of Godfrey by the agency concerning events which occurred during the representation of an employee who was subsequently disciplined adversely affects both Godfrey and the credibility of the union itself. Specifically, the union points to an incident some time before the removal action in which an agency manager requested that Godfrey be present at a meeting between appellant and the manager. The purpose of the meeting was to explain to appellant the agency's policy on unauthorized consumption and possession of commissary merchandise. The agency manager requested that Godfrey be present to assist in explaining the policy to appellant because of his concern that appellant did not fully understand the policy and its implications. See n.3, supra. The policy was explained at a meeting with all employees earlier that day. At the time this meeting

took place appellant was not accused of unauthorized consumption and posession of commissary merchandise and no disciplinary action was then contemplated.

The union alleges that several procedural errors occurred during the conduct of the proceedings below which affected its substantive rights. Specifically, the union contends: (1) that although the union submitted a Motion to Intervene below, the presiding official did not rule on this motion; (2) that the presiding official refused to allow the witness, whose testimony the union objected to, to have a union representative present at the hearing; and (3) that the presiding official improperly sequestered this union representative with the other witnesses.

The affidavits attached to the union's petition for review and the record evidence indicate that although the union filed a motion to intervene before the commencement of the hearing the presiding official did not rule on this motion. Irrespective of the outcome of the motion, the union had a right to make a motion for permissive intervention, see 5 C.F.R. § 1201.34(c)(1), and the presiding official was obligated to make a ruling on its motion. See 5 C.F.R. § 1201.41(b)(7).

The affidavits also indicate that Godfrey exercised her right to have a union representative (Kennington) present to advise her during her testimony but that the presiding official refused to allow the union official to act as Godfrey's representative. See Union's Petition and Intervention Motion, Attachments 1, 3, 6. Moreover, these affidavits indicate that this representative was sequestered with the hearing witnesses when the witnesses were excluded from the hearing. We find it was improper for the presiding official to take these actions. First, the sequestration rule only applies to witnesses to a proceeding and Kennington

was not a witness but was attempting to serve in a representational capacity to one of the witnesses to the proceeding. See Federal Rules of Evidence, Rule 615 (1984). Second, Board hearings are generally open to the public and may be closed only upon the issuance of an order by the presiding official setting forth the reasons necessitating a closed hearing. Finally, Board regulations specifically provide for the right of a witness to representation when testifying. See 5 C.F.R. § 1201.32.4/

In view of the foregoing analysis, we find that the presiding official erred with respect to the conduct of the hearing. We also find, however, that such errors did not affect the union's substantive rights because, for the reasons stated below, the union has failed to establish sufficient grounds to warrant intervention. See Karapinka v. Department of Energy, supra.

The Board has held that a presiding official has the discretion to grant a motion to intervene when the movant will be directly affected by the outcome of the proceeding. See Special Counsel v. Filiberti, MSPB Docket No. HQ12068310018 INTER (September 27, 1984); 5 C.F.R. § 1201.34(c)(2). The union seeks to establish that it will be directly affected by this proceeding for reasons independent of and unrelated to the issues raised by the appellant in the petition for appeal. It contends: (1) that it was affected by the proceeding because the agency claimed a right to question Godfrey as a witness during the hearing concerning events which occurred during the representation

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4/ The union also contends that it was error for the presiding official to deny its right to correct the transcript on the ground that the union was not a party to the proceeding. See Union's Petition and Intervention Motion, Attachment 6. In view of our ruling below that the union was not entitled to intervene, it is unnecessary to address this contention.

of an employee who was subsequently disciplined; and (2) that examination of union officials concerning their representation of an employee amounts to an unfair labor practice, see 5 U.S.C. § 7116(a)(1), and would violate the union's duty of fair representation under 5 U.S.C. § 7114(a)(1) since it makes it impossible to maintain a confidential relationship between the union member and the union representative if such testimony is required in a subsequent proceeding before the Merit Systems Protection Board. We find, however, that these contentions relate to issues arising out of the union's collective bargaining relationship with the agency rather than to issues which affect the appellant.[5/] In the present case, the union has not alleged that the appellant has been affected by the calling of Godfrey as a witness. In fact, Godfrey testified at the request of appellant, and the presiding official specifically approved Godfrey's appearance at appellant's request and not at the request of the agency, Hearing Transcript at 11. Furthermore, the record does not establish that Godfrey was acting as appellant's representative when she attended the meeting between appellant and the agency manager. Thus, we conclude that the union has not established that it is affected by this proceeding.

Accordingly, the union's petition for review and motion to intervene are DENIED and the initial decision is AFFIRMED as MODIFIED. The agency is ORDERED to cancel the removal action and substitute in its place a 30-day suspension, to award back pay in accordance with 5 C.F.R. § 550.805, and to submit proof of compliance with this order to the Office of the Clerk of the Board within twenty (20) days of issuance of this Opinion and Order. Any petition for enforcement of this order shall be made to the Dallas Regional office in accordance with 5 C.F.R. § 1201.181(a).

5/ In this regard, see Cornelius v. Nutt, 83-1673 (S. Ct. June 24, 1985), recognizing that a union's rights and position in the collective bargaining process differ from its rights and status in the statutory appeals procedure before the Board.

This is the final decision of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.